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In re Application of :
Mark C. Poznansky et al :
Serial No.: 10/002,854 : PETITION DECISION
Filed: November 1, 2001 :
Attorney Docket No.: 62053CIP :

This is in response to the petition under 37 CFR 1.181, filed January 20, 2006, requesting withdrawal of the Final rejection, and alternatively application of 37 CFR 1.183, if necessary.

BACKGROUND

A review of the file history shows that applicants filed a reply to a non-Final Office action on December 21, 2004, in response to the rejection of claims 1, 10 and 85-105, some of which were amended. The examiner then mailed a Final Office action to applicants on March 30, 2005, again rejecting all claims under 35 U.S.C. 103(a) as obvious over Yamaguchi et al. On June 30, 2005, applicants filed a reply to the Final Office action in which claims 87-90, 99 and 101-104 were canceled and claims 1, 10, 85-86, 100 and 105 were amended and the rejection argued.

On or about July 27, 2005, applicants' attorney, Amy Leahy, contacted the examiner to determine the status of the submitted amendment. The examiner orally indicated that the amendment did not place the application in condition for allowance and that an Advisory action was in preparation which would give further explanation. Based on the oral indication of non-allowance, applicants filed a Notice of Appeal on August 1, 2005. For unexplained reasons the Advisory Action was not mailed to applicants until December 8, 2005, indicating that the amendment of June 30, 2005, would be entered, but did not place the application in condition for allowance.

Applicants filed this petition on January 20, 2006, seeking withdrawal of the Final Office action or, alternatively, to restart the period for reply so as to allow applicants proper time to respond to the Advisory action.

DISCUSSION

Applicants do not argue that the Final Office action was premature or improper. Therefore, withdrawal of the finality of the Office action is not proper. Applicants do request restarting of the time period for reply. However, applicants do not argue non-receipt or late receipt of the

Final Office action. Therefor there is no proper reason for restarting the period for reply. In fact applicants do argue that they filed a timely reply to the Final Office action within the three month shortened statutory period set and that they followed up to determine the status of the reply within four weeks of the filing thereof. At that time they were orally informed that the amendment did not place the application in condition for allowance, but were not informed as to whether the amendment would be entered or not, only that an Advisory action would be forthcoming. Unfortunately, and for unexplained reasons, the Advisory action accompanied by the telephone Interview Summary, was not mailed to applicants until December 8, 2005. This occurred despite applicants' additional telephone inquiries to the examiner as to when the Advisory action would be mailed and its content. Applicants argue that the delay has prejudiced them in responding to the examiner's comments as to why the lone rejection of record was not overcome by applicants' previous response. Applicants seek restarting of the period for reply to the Final Office action so as to allow them a further opportunity to respond to the /final Office action or, if necessary, waiver of the Rules under 37 CFR 1.183 to allow such action on the part of applicants.

It is noted that applicants filed a Notice of Appeal based on the above noted telephone interview as to the status of the amendment submitted in response to the Final Office action. The filing of the Notice of Appeal triggered the start of a new time period under 37 CFR 1.192 for filing of an Appeal Brief. The Notice of Appeal was filed four months after the issuance of the Final Office action, not at the end of the six month statutory period. The filing of the Notice of Appeal and its entry in the Office PALM system effected a change of status for the application which removed it from the examiner's pending docket and deleted the requirement for mailing of an Advisory action from the examiner's docket. Such, however, does not excuse the examiner's delay in failing to timely mail the Advisory action, but may explain why it happened. Applicants do indicate that several telephone calls were made to the examiner as to when the Advisory action would be mailed, but no indication is given as to when those calls were made.

In view of the fact that it was applicants' action, the filing of the Notice of Appeal, which triggered the start of the time period currently running for filing of the Appeal Brief, or taking other appropriate action, no relief requested by applicants can be granted. Further, while the circumstances which engendered this petition are unusual, they do not appear to rise to the level of the requirements for granting a waiver under 37 CFR 1.183. Such circumstances generally would arise only when an action required by one Rule would conflict with the requirements of another Rule. Such is not seen herein.

DECISION

The petition is **DENIED**.

Applicants' Appeal Brief (or the taking of other appropriate action) remains due within the time period set in 37 CFR 1.192, or as may be extended under 37 CFR 1.136(a).

As there is not fee for this petition, the petition fee paid of \$400.00 will be credited to applicants' Deposit Account No. 04-1105, as directed.

Should there be any questions about this decision please contact William R. Dixon, Jr., by letter addressed to Director, TC 1600, at the address listed above, or by telephone at 571-272-0519 or by facsimile sent to the general Office facsimile number 571-273-8300.

A handwritten signature in black ink, appearing to read "Bruce M. Kisliuk", with a stylized, cursive script.

Bruce M. Kisliuk
Director, Technology Center 1600